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APR 2005

STATE OF MICHIGAN
IN THE SUPREME COURT

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Appeal from the Court of Appeals
The Honorable William C. Whitbeck, Peter D. O'Connell and Patrick M. Meter

CITY OF NOVI, a Michigan municipal corporation,

Plaintiff-Appellant,

vs.

ROBERT ADELL CHILDRENS FUNDED TRUST, FRANKLIN ADELL CHILDRENS FUNDED TRUST, MARVIN ADELL CHILDRENS FUNDED TRUST and NOVI EXPO CENTER, INC., a Michigan corporation,

Defendants-Appellees.
_____/

Supreme Court No. 122985

Court of Appeals No. 223944

Lower Court No. 98-008863-CC

APPELLEES' RESPONSE TO APPELLANT'S REPLY BRIEF

Respectfully submitted,

STEINHARDT PESICK & COHEN,
Professional Corporation

BY: H. ADAM COHEN (P47202)
JEROME P. PESICK (P29039)
JASON C. LONG (P59244)
Attorneys for Defendants-Appellees
Adell Childrens Funded Trusts
28400 Northwestern Highway
Suite 120
Southfield, MI 48034
(248) 356-5888

Dated: March 28, 2005

STEINHARDT PESICK & COHEN • PROFESSIONAL CORPORATION • ESSEX CENTRE • 28400 NORTHWESTERN HWY. • SUITE 120 • SOUTHFIELD, MI 48034-8346 • (248) 356-5888

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I. INTRODUCTION

The Adell Childrens Funded Trust Appellees ("Adells") have filed a Motion seeking permission to file this responsive brief. The Adells have no intention of responding to each and every argument contained in the Appellant City of Novi's ("City's") Reply. But the City's Reply raises three particular issues which the Adells feel compelled to succinctly address in writing. First, the City now urges that the Adells donated, or promised to donate, their property for the A.E. Wisne Drive. Second, the City implies that the old driveway serving Wisne's property was not reconstructed. Third, the City claims that, in asserting that judicial review is available in all cases involving challenges to public use or necessity, the Adells seek to change Michigan law. As set forth below, these three basic arguments from the City's Reply are incorrect.

II. ARGUMENT

A. The Parties Stipulated at Trial that the Adells Never Donated or Promised to Donate Property for the A.E. Wisne Drive

Based upon the letter submitted as Appellant's Supplemental Appendix at 319a, at one time the City wished to argue that the Adells had actually donated their property for the A.E. Wisne Drive. By the time of trial, however, the City had abandoned that theory (and never referenced the letter, which makes no mention of the driveway, at trial). During discovery, the Adells showed that, years earlier, they had conditionally agreed to donate property for the Ring Road itself, but never the A.E. Wisne driveway. In fact, in another letter now submitted by the City to this Court (also never used at trial), the City's own engineer advised the City that, "The Adells also expressed that they were unaware of the proposed Industrial Spur (A.E. Wisne Drive) construction."[1] Thus, prior to commencing with proofs at trial, the parties agreed on the record that

the City had no intention of making its "donation" argument:

> [ADELLS' COUNSEL, MR. GOLDSMITH]: During the course of discovery the City of Novi, in its questioning of our witnesses, attempted to indicate somehow that the Adells gave property to the City, the property that's in dispute. Now that has not been pled. If it was pled, we would have filed a motion to strike it on the statute of frauds that it's not in writing.[2] We would like the Court --
>
> THE COURT: What's not in writing, the proper --
>
> [CITY'S COUNSEL, MR. FREID]: May I comment, your Honor?
>
> THE COURT: Yes
>
> [CITY'S COUNSEL, MR. FREID]: **There is no claim that the Adells gave the City of Novi any property at all.**
>
> [ADELLS' COUNSEL, MR. GOLDSMITH]: **Promised to give it to them --** it's going to take our case longer if we have to deal with that issue...
>
> THE COURT: He just said you don't
>
> [CITY'S COUNSEL, MR. FREID]: **That's correct, your Honor** (emphasis added).[3]

The City therefore confirmed that it was declining to pursue a theory of a donation or "promised" donation. Following its stipulation on the record, the City never argued at trial -- and only argues now in its Reply -- that the Adells donated or promised to donate their land for the A.E. Wisne driveway. The City's belated contention, that City manager Kriewall behaved as he did because he was "under the assumption...that the City already had the Adells' agreement to the spur road," is absolutely unsupported by the trial record.

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[1] Appellant's Supplemental Appendix at 321a.

[2] The Adells never agreed to donate land for the driveway itself, and no writing showed otherwise.

[3] Appellees' Supplemental Appendix at 81b-82b. Even the Ring Road discussions had been conditional: "However, any approval of a final plan for dedication of trust property of the necessary right-of-way is subject to review by the Trust's legal [counsel] and other advis[e]rs." Appellant's

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As the City's Brief seems to confirm, if any assurances were ever given concerning the A.E. Wisne Drive, they came not from the Adells, but from the Adells' tenant: the draft letter, again not submitted into evidence, which the City now presents to this Court as its Supplemental Appendix at 320a, was prepared by the Novi Expo Center's tenant and went unsigned by the Adells. See City's Reply at p. 5; Appellant's Supplemental Appendix at 320a. Side by side, the two letters now presented as the Appellant's Supplemental Appendixes at 319a and 320a paint a telling picture: the letter signed by the Adells' representative makes no mention whatsoever of the A.E. Wisne driveway. The tenant's letter, which does reference the driveway, was never signed by the Adells.[4] This was the same gracious tenant who was promising that the Adells' neighbor, General Filters, would also donate land to the City.[5] That alleged "promise" never came to fruition either.[6] Thus, having abandoned its theory that the Adells had promised to donate their land for Wisne's driveway, the City resorts to an unsigned, draft letter from a tenant.

In the last analysis, it is clear that, confronting a situation in which the Adells offered an aerial photograph (discussed below) of a driveway that was constructed long after the trial concluded, the City has decided to reconstruct its entire case by relying upon documents that it never offered, and arguments that it abandoned by stipulation, at trial. The fundamental distinction is that the Adells' aerial photograph did not exist at trial because Wisne's new driveway -- depicted in that photograph -- did not yet exist at the time of trial. Conversely, all three letters contained in the Appellant's Supplemental Appendix at 319a-321a, existed at the time of trial but went unused because they support the Adells' position: the Adells made no promise or

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Supplemental Appendix at 319a.

[4] Appellant's Supplemental Appendix at 319a-320a.

[5] Appellees' Appendix at 5b.

[6] Appellees' Appendix at 58b-60b.

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donation for the A.E. Wisne driveway.

The City never raised the issue of an alleged "donation" for A.E. Wisne Drive at trial, in its briefs to the Court of Appeals, in its oral argument to the Court of Appeals, in its Application for Leave to Appeal to this Court, or in its Brief on Appeal. Following its agreement on the record that it had chosen not to pursue that theory, it was not until its Reply Brief that the City changed course.

B. The Road Commission Constructed a New Driveway for Wisne Onto Grand River Avenue

The City's Reply initially refers to the Adells' aerial photograph as depicting "the same driveway" as that which existed at the time of trial,[7] but then states that, "The City was reluctant to introduce new evidence in this Court."[8] Of course, the aerial photograph depicts one or the other, not both: it is either the same driveway as that which existed at the time of trial, or "new evidence" of a newly constructed driveway. The City's Reply ultimately concedes the latter when it states that the aerial photograph reveals a "replacement of the drive,"[9] which the City characterizes as "still presumably dangerous."[10] In other words, on the sheer basis that the new driveway occupies the same **location** as the old, the City asks this Court to "presume" that the Road Commission built a new dangerous driveway. The City refuses to acknowledge that the entire Grand River Road and Bridge, and Wisne's new driveway onto the road, were reconstructed complete with new grades as shown in the photograph itself.

The City's argument boils down to the fact that, before this attempted taking, neither the City nor the Road Commission considered constructing Wisne's new driveway on Wisne's own property.[11] Now that the Road Commission has actually

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[7] City's Reply at 1.
[8] City's Reply at 2.
[9] City's Reply at 6.
[10] City's Reply at 6.
[11] City of Novi v Robert Adell Childrens Funded Trust, 253 Mich App 330, 346; 659 NW2d 615

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done so, the City is left to argue that the new driveway is "presumably dangerous," and that the City was "reluctant" to bring this post-trial fact to this Court's attention. The new driveway offers powerful confirmation of the lower courts' findings of lack of public use and necessity.

C. The City Seeks to Change Michigan Constitutional Law

Based upon their Briefs on Appeal to this Court, the most fundamental difference in the parties' positions is this: the City argued that public roads are "by definition" public uses,[12] whereas the Adells contend that Michigan landowners are constitutionally entitled to judicial review of City Councils' declarations of public use, whether for road projects or otherwise. In its Reply, however, the City offers an ambiguous retreat from its earlier, absolutist position: "The City does not suggest, as the Adells claim, that public roads or other infrastructure improvements are not subject to judicial review, but rather that public roads and other infrastructure have already been judicially-determined to be actual public uses."[13] Thus, in the one instance where the City claims that it is not advocating a bright line rule after all, it offers, with all due respect, an unintelligible explanation. Does the City mean that, because certain reported cases have held, following exhaustive factual analyses, that particular public roads qualified as public uses, that all future proposed public roads automatically qualify as such? This brings the City back to its unconstitutional theory that public roads are now beyond judicial review. The City's ambiguous statement, submitted in its Reply, seems to sound a retreat from the "by definition" stance taken in the City's Brief on Appeal, but a retreat to whereabouts unknown.

(2002).

[12] City's Brief on Appeal at 16.

[13] City's Reply at 10.

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Similarly, several truths undermine the City's statement that, "The impact of conducting such a [judicial] review of every taking on judicial and taxpayer resources is mind-boggling."[14] First, it is the City, not the Adells, which is attempting to fundamentally alter Michigan constitutional law. The City has identified no Michigan case holding that a municipal declaration of public use is beyond review for any reason, let alone on the basis of preserving taxpayer resources. Presumably, if bolstering the tax base was the primary concern in Michigan eminent domain cases, Hathcock[15] would have been decided differently. Every case decided by this Court permits judicial review of a challenged taking, and on this point alone the City's appeal fails.

Second, the Adells are not requesting a "new test" to govern this or any other case.[16] Discerning a taking's primary, versus incidental, beneficiary has always been the trial court's role in Michigan. The City claims that all cases cited by the Adells on that point involved "either a transfer of property to a third party or the exclusion or limitation of the public from the use of the property affected."[17] Legally, the City is incorrect because judicial review has never been confined to condemnation cases involving transfers or "exclusion" of the public. And factually, it is indisputable that Shizas[18] and Edward Rose Realty[19] were both cases where the public would permanently retain ownership of the taken property. These two cases straddle Poletown, Shizas having occurred before and Edward Rose after the Poletown decision.[20] Hathcock reversed Poletown's support of takings for later transfer to private third parties; it did not eviscerate landowners' rights to judicial review of

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[14] City's Reply at 9.
[15] Wayne County v Hathcock, 471 Mich App 445; 684 NW2d 765 (2004).
[16] City's Reply at 7.
[17] City's Reply at 7.
[18] Shizas v City of Detroit, 333 Mich 44; 52 NW2d 589 (1952).
[19] City of Lansing v Edward Rose Realty, Inc., 442 Mich 622; 502 NW2d 638 (1993).

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attempted takings.

Finally, as the Adells are not seeking to change the law at all, it would be incumbent upon the City to show that taxpayers have **historically** incurred "mind boggling costs" as a result of public use challenges. The City has made no such showing. Yet the City would have a certain class of takings, including the one attempted here, immunized from judicial review once a City Council simply declares the taking to be for public use. The factual record in this case is perhaps the best example available of the dangers inherent in such a position.

III. CONCLUSION

The City now equates Wisne's property to Twelve Oaks Mall, invokes numerous outside-the-record documents which existed at the time of trial (but were abandoned by the City), and apparently retreats from its theory on appeal that public roads are "by definition" public uses. The Adells respectfully request that this honorable Court affirm.

Respectfully submitted,

STEINHARDT PESICK & COHEN,
Professional Corporation

By: _____

H. Adam Cohen (P47202)
Jerome P. Pesick (P29039)
Jason C. Long (P59244)
Attorneys for Defendants-Appellees
Adell Childrens Funded Trusts
28400 Northwestern Highway, Ste. 120
Southfield, MI 48034-8346
(248) 356-5888

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[20] Poletown Neighborhood Council v City of Detroit, 410 Mich 616; 304 NW2d 455 (1981).